

1 (In open court.)

2 THE CLERK: 18 C 6447, Malibu Media v. Doe. And I
3 need to get Ms. Schulz on the line.

4 (Clerk places telephone call.)

5 MS. SCHULZ: This is Mary Schulz.

6 THE CLERK: Hi, Ms. Schulz. It's Sandy with Judge
7 Durkin calling on 18 C 6447, Malibu Media v. Doe.

8 THE COURT: All right. Good morning. Let's have --

9 MS. SCHULZ: Mary --

10 THE COURT: -- everyone identify themselves for the
11 record, starting first with the person on the phone.

12 MS. SCHULZ: Mary Schulz on behalf of Malibu Media.

13 MS. MALTER: Good morning, your Honor. Susan Malter
14 on behalf of William Mullins, the defendant.

15 THE COURT: All right. Good morning.

16 There's a fully briefed motion to dismiss. I've read
17 the complaint over again and then read the memorandums in
18 support of the motion to dismiss, the response, and the reply.

19 I'm -- I'm puzzled. In many of these cases -- and
20 I've had many of these cases -- when a defendant makes a very
21 forceful claim they're not the person that downloaded the -- in
22 this case pornography, the plaintiffs -- Malibu Media in this
23 case and in many other cases -- where it's both -- whatever the
24 medium is, whatever the movies are, there is often a careful
25 review by plaintiffs of whether or not the defendant is -- they

1 have their facts straight because my experience is that the
2 plaintiff -- and many cases with Malibu Media, they will drop
3 the case if there's a credible claim someone else downloaded
4 the movies. Was that done in this case?

5 MS. MALTER: No.

6 MS. SCHULZ: Mary Schulz on behalf of Malibu Media.

7 Yes, your Honor, there was a full investigation. And
8 that is our procedure.

9 THE COURT: All right.

10 MS. MALTER: Your Honor --

11 THE COURT: Go ahead.

12 MS. MALTER: -- if I may. The procedure only gets so
13 far as to the -- at least what's been presented by the
14 plaintiff is only that an IP address is associated with the
15 downloads, but not specifically the defendant.

16 THE COURT: Sure. It's -- this is an easy question.
17 It -- you're not challenging the -- or are you? -- that the
18 IP address that they've identified is a correct one.

19 MS. MALTER: It's possible. We haven't gotten any
20 early discovery. We submitted ours. So we haven't seen any of
21 their data, so we have no idea whether -- you know, whether
22 their technology -- we don't know.

23 THE COURT: All right. Your client, according to
24 the -- the briefing, says "Not me."

25 MS. MALTER: Absolutely.

1 THE COURT: Does he have -- does he live with anyone?

2 MS. MALTER: He lives with his wife.

3 THE COURT: All right. And he has, I assume, wireless
4 Internet?

5 MS. MALTER: He has wireless. He lives in a multiunit
6 building. And he used to -- and I -- and next to the building
7 also, it's a set of -- he said a bunch of units that are all
8 close together. It could be anyone who's using Internet.

9 He's since -- he received notice from Comcast. They
10 used to have multiple Internet connections and Wi-Fi things.
11 He said they disconnected everything. They upped their privacy
12 protection so nothing would happen.

13 But he's happy to make his computer available. We
14 just haven't gotten to discovery yet. We've shared --

15 THE COURT: All right. Well, does he have
16 password-protected Wi-Fi?

17 MS. MALTER: Yes.

18 THE COURT: Did he at the time of the allegations in
19 this complaint?

20 MS. MALTER: I think so.

21 THE COURT: All right.

22 MS. MALTER: Oh, no. I -- I'm not positive about --

23 THE COURT: All right.

24 MS. MALTER: I don't remember anymore.

25 THE COURT: And the allegation is there were, what,

1 nine movies, or at least nine pieces of movies downloaded?

2 MS. MALTER: Right. He denies having downloaded any
3 such movies or any of those movies.

4 THE COURT: All right. Well, that's really a question
5 that is reserved for summary judgment, not on a motion to
6 dismiss.

7 I read your brief. I know the Ninth Circuit has said
8 you need more than just an allegation that a person who is
9 associated with an IP address downloaded the movies. We don't
10 know if he downloaded the movies. We know someone did using
11 that IP address. That's the plausible allegation of the
12 complaint.

13 The Ninth Circuit is not the Seventh Circuit. Judge
14 Ellis dismissed a similar case. You quoted -- you noted that.
15 And even she noted in her opinion there's a split of authority.
16 There's a number of case -- number of district courts that have
17 found that the allegations in a complaint such as this which
18 plausibly allege that an IP address downloaded either the total
19 or pieces of a copyrighted movie, that's a plausible allegation
20 to survive a motion to dismiss.

21 MS. MALTER: He hasn't yet shown that for sure. We --
22 there's nothing that -- well, we haven't seen any evidence.
23 But we're not sure that anything's been seen that has been
24 downloaded.

25 THE COURT: Well, I understand that. But this is --

1 and, quite frankly, if the evidence -- evidence, not
2 allegations -- evidence supports that, summary judgment's going
3 to get granted for you. If the -- if there's a factual dispute
4 at summary judgment, then we'll go to trial.

5 MS. MALTER: Okay.

6 THE COURT: But --

7 MS. MALTER: You'd like to see more evidence. You'd
8 like to see --

9 THE COURT: Well, I --

10 MS. MALTER: -- you'd like to see details.

11 THE COURT: -- I don't look at evidence at the
12 pleadings stage. I look at the plausibility of the complaint.
13 This complaint -- a complaint such as this has been upheld
14 numerous times by courts. Some courts have said no. Some
15 courts have dismissed complaints on summary judgment when a
16 client such as yours comes in, plausibly alleges that he had --
17 that he's not the one who downloaded it and there's no evidence
18 to contradict it.

19 If it turns out that he says, "I didn't download it,"
20 and they have nine movies downloaded to that IP address and
21 it's password-protected and a variety of other things, that
22 will be a jury to decide. Do they believe your client, or do
23 they believe the allegations of the complaint?

24 But I can't dismiss this complaint at this stage
25 because they've plausibly alleged that the person associated --

1 or that -- associated with that IP address downloaded the
2 movie. I think the best cite for that is the *Patrick*
3 *Collins v. Osburn* case at -- case out of Maryland: "[I]t takes
4 no great imagination to see how evidence that a file was
5 downloaded by a certain IP address could support a plausible
6 claim that the file was downloaded by the subscriber at that
7 IP address." I --

8 MS. MALTER: Your Honor, I --

9 THE COURT: -- I agree with that.

10 MS. MALTER: -- I understand what you're saying.

11 Our concern has been in general -- this is my 12th
12 case like this, mostly for indigent people.

13 THE COURT: Mm-hmm.

14 MS. MALTER: I mean, I came out of retirement and
15 reactivated to be able to handle cases like this.

16 THE COURT: Sure.

17 THE CLERK: Excuse me.

18 MS. MALTER: Oh.

19 THE CLERK: I just got a message from -- she said
20 she's -- her cell phone dropped. So I need to call her back.

21 MS. MALTER: Oh.

22 THE COURT: Okay.

23 THE CLERK: I don't know if this is her trying to call
24 or this is Mr. --

25 THE COURT: Let's go off the record for a minute.

1 (Off-the-record discussion.)

2 COURT REPORTER: Do you want this off the record?

3 THE COURT: Let's go back on the record.

4 THE CLERK: Okay. Can you hear us okay?

5 MS. SCHULZ: Yes. Thank you. I'm sorry.

6 THE CLERK: All right. Thank you.

7 THE COURT: I don't know when you dropped off,
8 Ms. Schulz, but the gist of what I'm saying is that I believe a
9 plausible complaint has been -- plausible claim has been filed.
10 I'm surprised, if there's an adamant denial of downloading --
11 you can't accidentally down this -- do this.

12 MS. MALTER: Right.

13 THE COURT: This is not something someone bumps into
14 and accidentally does a mouse click, and all of a sudden they're
15 in the middle of a lawsuit.

16 This -- my understanding of the technology, the
17 BitTorrent technology and the efforts to join the swarm and
18 then download the files back into a movie are intentional acts
19 that can't be done without some thought and conduct.

20 There's a split of authority. There's no real split
21 of authority. There's a Ninth Circuit case that would -- if
22 you were in California, you might get this complaint dismissed,
23 or in the Ninth Circuit. A number of other district courts
24 have found both ways.

25 I believe there's a plausible complaint here. But

1 I'm -- I'm really surprised that given -- that this has reached
2 the stage it has. Would your client be willing to -- I suppose
3 it would end up being a deposition. But is there any other
4 evidence you can provide to the plaintiff that would show your
5 client was not the person involved?

6 We've had situations where grandmothers have been
7 named -- and clearly they're not downloading pornography -- and
8 it turns out there's a teenage grandson or nephew that's in the
9 house, and they've done it.

10 MS. MALTER: My client sent me records of being at
11 work at the time. I didn't think it was appropriate to include
12 that in -- in the -- in this motion.

13 THE COURT: You're right.

14 MS. MALTER: And he has his computer. He's happy to
15 turn his computer over. But we -- we would like to be able to
16 see the initial disclosures from the plaintiff as well to see.

17 I mean, part of the problem with this, absolutely the
18 federal rules suggest exactly what you're saying in terms of
19 the order of steps. But all of the cases that I've handled and
20 seen and then -- and read about and talked with other
21 attorneys, there isn't evidence.

22 And the whole point is people are so afraid -- for the
23 most part, an attorney charges about \$10,000 for litigation in
24 IP. So I -- this is only my very first case with Malibu Media.
25 I've dealt with the other attorneys in the Chicago area.

1 But it's all been much, much cheaper to settle, and so
2 a settlement is arranged regardless of -- even when people
3 are -- even when people know themselves not to have done
4 anything, to pay \$10,000 and spend money on legal time makes it
5 impossible.

6 So it would be nice for somehow -- I don't know how
7 the rules committee works. But cases like this really hurt
8 someone who hasn't done anything because you can just -- in my
9 other cases, I know that the people didn't do this either.
10 Some of them were old women. Some were people who didn't use
11 the Internet. One guy lived in -- you know, none of my cases
12 so far.

13 I know that some people do this, and it's a terrible
14 thing. But somehow the way these cases work really put -- put
15 too much expense on defendants to have to -- I mean, I don't
16 charge very much because I'm -- I think this is so horrible
17 that this is going on, and so I'm trying to help. But -- and
18 I'm happy to come back and do the next step.

19 But somehow maybe for this, if there was earlier
20 initial disclosures in cases like this where, I mean, the
21 possibility -- it's theoretically possible, but -- I'm sorry.
22 I have it in my brief. It just seems -- it's disappointing
23 because of the expenses involved, that people normally
24 wouldn't -- so you really don't know what's happening in most
25 of the cases that are being dismissed when people are paying

1 \$500 or \$400 to not have to come into a case, not necessarily
2 because they've done something wrong.

3 THE COURT: I think -- and, Ms. Schulz, you can either
4 confirm or deny this. But I think Malibu Media has dropped
5 cases when there's plausible information presented to them
6 outside the court context --

7 MS. MALTER: Oh, we haven't --

8 THE COURT: -- that it's in --

9 MS. MALTER: -- been asked for any.

10 THE COURT: Well, let me finish.

11 MS. MALTER: Oh.

12 THE COURT: (Continuing) -- plausible information
13 presented to them outside the court context that the named
14 defendant either couldn't have done it, is unlikely to have
15 done it either because of age or access by someone who is more
16 likely a copier or infringer, other factors.

17 Ms. Schulz, has Malibu Media done that?

18 MS. SCHULZ: Absolutely, your Honor.

19 And your example of the -- the owner of the IP address
20 being an elderly woman with a teenage son in the house is -- is
21 the example I give to why we conduct an investigation.

22 And Malibu Media makes a great deal of effort in that
23 case to never amend the complaint to name just the subscriber
24 because they're a subscriber, but rather because we believe
25 that the person that we name is the infringer.

1 And I have had many cases where the subscriber is --
2 is obviously or -- or convinces us that they are not the
3 infringer and we don't amend the complaint to name the
4 subscriber. We, however, do name the person that we believe is
5 the subscriber.

6 THE COURT: Did you --

7 MS. SCHULZ: And --

8 THE COURT: Did you have such a discussion in this
9 case before you amended the complaint?

10 MS. SCHULZ: I -- I did not conduct the investigation.
11 And I do not know what information was available to us from the
12 subscriber prior to the complaint being amended.

13 But I can assure the Court that we didn't just name
14 the subscriber because we could, but rather because we had a
15 good-faith belief that the subscriber was, in fact, the
16 infringer. And we follow Rule 11, obviously.

17 THE COURT: Well, Ms. Malter, you mentioned there's
18 a -- in your briefs quite a bit that this is a potential for
19 abuse, that -- you say there's knowingly false statements in
20 the complaint and that there's no real remedy.

21 I'll tell you the remedy. If there are knowingly
22 false statements in the complaint that are determined if we go
23 further on this litigation, I'll award fees. I'm entitled to
24 do that under Rule 11. Ms. Schulz just mentioned Rule 11, and
25 she understands what the obligations are of an attorney who

1 brings a case against someone and forces them to defend a case
2 if there are knowingly false representations in a complaint.

3 And so you're not remediless, although your client, of
4 course, is going to have to defend it. He's in federal court.
5 He's fortunate to have an attorney who's -- wants to defend it
6 for him because many people don't have attorneys in these
7 cases.

8 And what I'd suggest you do is do early discovery.
9 Exchange -- make disclosures. Turn over your client's computer
10 if that's something they think they can use to determine
11 whether or not he's the one that was involved in this, although
12 I don't think -- well, I don't know enough about their review
13 of it and what your client has on the computer that would
14 elucidate the issues.

15 But, you know, have your client be deposed. You take
16 a dep or two of the people who are, you know, saying that it's
17 him. And if there's a fact issue, I'll give you an early trial
18 date.

19 There's enough here to plausibly allege, because it's
20 his IP address, that he's the one who downloaded it. If -- and
21 I'm telling you if there's -- if it's not password-protected or
22 there's a -- he can present evidence that other people have
23 hacked into his computer of some kind -- in some way, I'm
24 confident Ms. Schulz is going to look at that and, you know,
25 credibly evaluate it.

1 If you can't convince them, then you've got to
2 convince a jury.

3 MS. MALTER: Okay.

4 THE COURT: Or me on summary judgment.

5 But this is not the -- I'm denying the motion to
6 dismiss for all those reasons. There's a plausible complaint
7 here, and the only controlling authority is Ninth Circuit
8 authority, not Seventh Circuit authority. So there's a split.
9 I happen to believe this meets the test under *Iqbal* and *Twombly*
10 to support a plausible claim.

11 MS. MALTER: Your Honor, could I -- can I ask? I'm
12 not sure I understood Ms. Schulz's explanation of what the
13 investigation was. Will that be part of discovery then too?

14 THE COURT: Yeah.

15 Ms. Schulz, I assume you're going to let counsel
16 know -- and this is something you ought to do just to see if
17 you can resolve the case. Let counsel know what it is that
18 convinced you and your client to name him when you amended the
19 complaint because I know you start --

20 MS. SCHULZ: Yes.

21 THE COURT: -- as a John Doe. You end up amending a
22 complaint and name someone when you become certain that it's
23 the person who downloaded it or at least believe it's the
24 person who downloaded it and usually have conversations with
25 the IP address owner. But if Ms. Malter's not familiar with

1 what you did there, I think you need to tell her.

2 MS. SCHULZ: Understand, your Honor. I will find out
3 what information I can from my client with regard to their --
4 their investigation and their belief. And, obviously -- I hate
5 discovery, so I'm happy to do things informally if it resolves
6 the case.

7 MS. MALTER: I'll --

8 THE COURT: Well --

9 MS. MALTER: Oh.

10 THE COURT: Well, here's what -- oh, go ahead. What
11 were you going to say?

12 MS. MALTER: Your Honor, there was some confusion
13 about the dates, I think, maybe on my part with the MIDPP.
14 We -- is it -- when does it -- this -- the count begin?

15 THE COURT: It begins when an answer is due. And
16 because I'm denying the motion to dismiss today, an answer is
17 due. I'm going to give you 45 days, an extended period, to
18 file the answer.

19 MS. MALTER: Okay.

20 THE COURT: And what I'm going to have is a status in
21 30 days. And taking Ms. Schulz at her representation she hates
22 discovery, I'm going to let you both engage in informal
23 discovery. Provide anything to each other that might help
24 resolve this. Have a discussion about what they -- why they
25 think your client did what they allege he did.

1 And then when you come back in 30 days, if it turns
2 out you can't resolve it, the -- well, what I'm going to do is
3 suspend your obligation under MIDP and to file an answer until
4 that 30-day status.

5 MS. MALTER: Okay.

6 THE COURT: On that date, if you can't resolve it,
7 I'll give you a period of time to answer. That will kick in
8 the mandatory disclosures. And you can start with written
9 discovery and potentially oral discovery at that point.

10 MS. MALTER: Okay.

11 THE COURT: So we'll give you a date in 30 days. And,
12 Ms. Schulz, let's make that a date you can be here. So --

13 MS. SCHULZ: Your Honor -- okay.

14 THE COURT: Well, we'll give you a date first. You
15 tell me if you can be here.

16 THE CLERK: June 19th.

17 MS. SCHULZ: Okay.

18 THE CLERK: June 19th.

19 MS. SCHULZ: Yes, your Honor.

20 THE COURT: Okay.

21 MS. SCHULZ: I will be there.

22 THE COURT: All right.

23 And, Ms. Malter, does that work for you?

24 MS. MALTER: Yes.

25 THE COURT: Okay. Let's do that. If you resolve the

1 case, no need for anybody to appear. Or if it's just a short
2 status to say -- to give me a short report, if you both want to
3 call in -- I know you come in from the north suburbs. So does
4 Ms. Schulz -- happy to do it by phone. I do that with all
5 parties. But I -- if we're going to have a substantive
6 discussion about things, then it's best people be here.

7 MS. MALTER: Okay.

8 THE COURT: Okay.

9 MS. SCHULZ: Thank you, your Honor.

10 THE COURT: Anything else at your end, Ms. Schulz?

11 MS. SCHULZ: No. Thank you.

12 THE COURT: Ms. Malter, anything else?

13 MS. MALTER: No. Thank you, your Honor.

14 THE COURT: All right. Thank you all. Okay.

15 (Concluded at 9:29 a.m.)

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct transcript of the
18 record of proceedings in the above-entitled matter.

19
20 /s/ LAURA R. RENKE
21 LAURA R. RENKE, CSR, RDR, CRR
22 Official Court Reporter
23
24
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June 12, 2019